Punj Llyod Oil & Gas (M) v Etiqa Insurance Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-442–06 OF 2013
HASNAH HASHIM J
4 JULY 2014

Civil Procedure — Action — Discontinuance of — Plaintiff applied to discontinue suit with liberty to file afresh after its first witness testified — Whether granting of liberty to file afresh would cause injustice to defendants and be an abuse of process of court — Whether plaintiff would have 'second bite of cherry' if it could file claim afresh against defendants

The plaintiff was one of four parties in a consortium which was awarded a project in relation to the construction of a gas pipeline extending from Kimanis in Sabah to Bintulu in Sarawak. By a construction all-risks insurance policy, the defendants insured the consortium against physical loss, damage, liability or expense arising from the project. Incessant rainfall and consequent flooding caused certain physical damage which the plaintiff contended was covered by the policy. When the defendants failed and/or refused to pay the plaintiff's claim for about RM14m, it filed the instant suit. The matter was set down for trial from 28–30 April 2014 and from 19–22 May 2014. After the plaintiff's first witness testified on 29 April 2014, the plaintiff informed the court that its next, and crucial, witness ('Umang') who was based in India could only come to testify on 19 May 2014. The court accordingly adjourned the hearing to that date. On 12 May 2014 the plaintiff informed the court that Umang would still not be able to attend court on the adjourned hearing date and asked for a postponement but it was refused by the court. The plaintiff then wrote to court to say that in view of the refusal it would withdraw its claim with liberty to file afresh. The defendants objected to the plaintiff's request for liberty to file afresh.

Held, allowing the plaintiff to withdraw the claim without liberty to file afresh:

(1) It would be a clear abuse of process of court and an injustice to the defendants if the plaintiff was allowed liberty to file the claim afresh as the cross-examination and re-examination of its first witness had been completed; it would be giving the plaintiff 'a second bite of the cherry'. There was also no guarantee Umang would be present at the trial (see para 18).

(2) When the suit was filed in June 2013, the plaintiff knew of Umang's importance as its main witness. When the trial dates were fixed at case management the court took into account the fact that witnesses from

abroad would testify. However, the plaintiff only informed the court of Umang's unavailability after its first witness had testified. The matter was adjourned on the plaintiff's assurance that Umang would attend court to testify and it had even filed his witness statement on 5 May 2014 (see paras 14–15 & 17–18).

[Bahasa Malaysia summary

Plaintif merupakan salah satu daripada empat pihak di dalam konsortium yang diawardkan projek yang berkaitan pembinaan talian paip gas terbentang dari Kimanis di Sabah ke Bintulu di Sarawak. Melalui polisi insurans semua risiko pembinaan, defendan-defendan menginsuranskan konsortium terhadap kerugian fizikal, ganti rugi, liabiliti atau perbelanjaan yang berbangkit daripada projek tersebut. Hujan lebat yang tidak henti-henti dan akibat langsung banjir menyebabkan kerosakan fizikal tertentu yang mana dihujahkan oleh plaintif dilindungi oleh polisi tersebut. Apabila defendan-defendan gagal dan/atau enggan membayar tuntutan plaintif untuk lebih kurang RM14 juta, ia memfailkan tindakan ini. Perkara tersebut ditetapkan untuk perbicaraan dari 28–30 April 2014 dan dari 19–22 Mei 2014. Selepas saksi pertama plaintif memberi keterangan pada 29 April 2014, plaintif memberitahu mahkamah bahawa saksi pentingnya yang lagi satu ('Umang') yang bekerja di India hanya dapat datang untuk memberi keterangan pada 19 Mei 2014. Mahkamah dengan itu menangguhkan pendengaran kepada tarikh tersebut. Pada 12 Mei 2014 plaintif memberitahu mahkamah bahawa Umang masih tidak dapat hadir ke mahkamah pada hari pendengaran tertangguh tersebut dan memohon untuk penangguhan tetapi ditolak oleh mahkamah. Plaintif kemudiannya menulis kepada mahkamah untuk menyatakan bahawa mengambil kira penolakan tersebut ia akan menarik balik tuntutannya dengan kebebasan untuk memfailkan sekali lagi. Defendan-defendan membantah kepada permohonan plaintif untuk kebebasan memfailkan sekali lagi.

Diputuskan, membenarkan plaintif menarik balik tuntutan tanpa kebebasan untuk memfailkan sekali lagi:

(1) Ia akan menjadi penyalahgunaan proses mahkamah yang jelas dan ketidakadilan kepada defendan-defendan jika plaintif dibenarkan kebebasan untuk memfailkan tuntutan sekali lagi memandangkan pemeriksaan balas dan pemeriksaan semula saksi pertamanya telah selesai; ia seperti akan memberikan kepada plaintif 'a second bite of the cherry'. Juga tidak terdapat jaminan Umang akan hadir semasa perbicaraan (lihat perenggan 18).

(2) Apabila tindakan difailkan pada Jun 2013, plaintif mengetahui pentingnya Umang sebagai saksi utamanya. Apabila tarikh-tarikh perbicaraan ditetapkan semasa pengurusan kes mahkamah mengambil kira fakta bahawa saksi-saksi daripada luar negeri akan memberi keterangan. Walau bagaimanapun, plaintif hanya memberitahu

mahkamah yang Umang tidak dapat datang selepas saksi pertamanya telah memberi keterangan. Perkara ditangguh atas jaminan plaintif yang Umang akan hadir ke mahkamah untuk memberi keterangan dan ia juga telah memfailkan pernyataan saksinya pada 5 May 2014 (lihat perenggan 14–15 & 17–18).]

Notes

For cases on discontinuance of action, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 129–140.

Legislation referred to

Companies Act 1965

Sanjay Mohan (K Gobinath and Adam Lee with him) (Kadir, Andri & Partners) for the plaintiff.
Ivan Loo (R Loshini and Austen with him) (Skrine) for the defendants.

Hasnah Hashim J:

BACKGROUND

[1] The plaintiff, Punj Lloyd Oil and Gas (M) Sdn Bhd is a private limited company incorporated in Malaysia under the Companies Act 1965 ('the CA') and having its registered address at Lot 6.05, Level 6 KPMG Tower, 8 First Avenue, Bandar Utama, 47800 Petaling Jaya, Selangor and its business address at Project Office, Similajau Bintulu-Miri Coastal Highway, PO Box No 1219, 97000 Bintulu, Sarawak.

[2] The first defendant, Etiqa Insurance Bhd is a public limited company incorporated in Malaysia under the CA. The second defendant, Multi-Purpose Insurans Bhd is a public limited company incorporated in Malaysia under the CA and the third defendant, MCIS Zurich Insurance Bhd is also a public limited company incorporated in Malaysia under the same aforesaid Act.

SALIENT FACTS

[3] On 6 March 2008 Petronas Carigali Sdn Bhd ('the principal') awarded a project in relation to the construction of the Sabah-Sarawak Gas Pipeline ('the project') from Kimanis, Sabah to Bintulu, Sarawak for a sum of RM2,907,326,500 to Punj Lloyd-Dialog-Petronab Consortium ('the consortium').

[4] The consortium consists of the following companies:

(a) the plaintiff;

(b) Punj Llyod Ltd;

(c) Dialog E & C Sdn Bhd; and

(d) Petrosab Logistik Sdn Bhd.

[5] By a construction all risks insurance policy dated 14 October 2008 ('the policy') the defendants agreed to insure the consortium, being one of the assured(s) against any physical loss, damage, liability or expense for the project from the period of 6 March 2008–6 August 2011 in the following sum:

LIMITS OF LIABILITY/SUMS INSURED (100%)		
All losses arising hereunder:		
(i)	- Physical damage - Special extensions	}Estimated total project value of RM2,907,326,500
(ii)	- Existing/Surrounding property	}RM50,000,000 any one accident or occurrence
Policy subject to combined single limit: RM1,000,000,000 any one accident or occurrence		
DEDUCTIBLE (10%)		
All claims arising hereunder:		
(i)	- Physical damage - Interest taken over by principle assured - Existing/Surrounding property	}RM3,800,000 any one accident or occurrence

[6] The project was divided into the four following sections as follows:

(a) Spread 1 KP 0 to KP 150;

(b) Spread 2 KP 150 to KP 270;

(c) Spread 3 KP 270 to KP 360; and

(d) Spread 4 KP 360 to KP 520.

[7] Under the said construction contract one of the components of the permanent works was the HDD bore hole from KP 87,803.598 (entry point) to KP 87,299.840 (exit point) ('the HDD') required for the purpose of installation (crossing) of the pipeline across the Mengalong River. The work involved drilling of a pilot hole with a 12.25" drill bit which was to be progressively enlarged to 28", 36", 42" and finally 48" using appropriately sized reamers. The pipeline would then be pulled through the borehole.

[8] To enable the above operation to take place, bentonite drilling fluid was continuously pumped into the borehole in order to seal the cracks and fissures along the borehole and holding all weathered rock in place as also preventing the walls of the drilled bore from collapsing. However, during the period between 23–27 December 2010 there was heavy rainfall at several location including at KP 15, KP 43, KP 99, KP 87, KP 106 and KP 109 in Section 1.

[9] Due to incessant heavy rainfall, on 27 December 2010 Section 1 was hit by severe floods causing damage to the aforementioned HDD bore hole and gravel access road at Sg Mengalong crossing and the right of way ('the ROW') at various locations and access roads in that area.

[10] The ROW as well as the access roads at locations KP 15, KP 43, KP 99, KP 106 and KP 109 were also submerged by floodwaters. It is the plaintiff's case that the incessant heavy rainfall and the subsequent flooding are expressly recognised as one of the incidents covered under the policy issued by the defendants.

[11] On 28 December 2010, immediately after the incident of heavy rain and subsequent flood on 27 December 2010 the plaintiff, through the consortium duly notified Petronas of its intention to recover losses pursuant to the policy. The consortium further provided Petronas with detailed report dated 19 February 2011 as regards its claim due to the heavy rain and subsequent flood incident.

[12] It is the contention of the plaintiff that in breach of the policy the defendants have failed and/or refused to pay to the plaintiff RM13,989,887 being the sums due and payable. The plaintiff claims against the defendant for the following:

(a) the sum of RM13,989,887 or alternatively, damages to be assessed;

(b) interest at the rate 5%pa in the total sum of RM13,989,887 from the date of filing of this claim until the date of judgment ('the judgment sum');

(c) interest at the rate of 5%pa on the sum of RM13,989,887 from the date of judgment until the date of full realisation; and

(d) cost.

DECISION AND REASON

[13] During case management ('CM') before me on 5 December 2013 the parties agreed that for the matter to be set down for trial on the following dates:

(a) 28–30 April 2014; and

(b) 19–22 May 2014.

[14] On 28 April 2014 the trial commenced. The plaintiff's first witness, Froid Manuummal Paily, the contract manager, gave evidence on 28 April 2014 and completed given his evidence on 29 April 2014. The plaintiff's counsel then informed the court that the next witness, Umang Srivastava, ('Umang') who is based in India could only come to testify on 19 May 2014. Despite the numerous CM that was conducted and the trial dates fixed to accommodate the foreign witnesses, the plaintiff counsel only informed the court after the first witness completed giving evidence. Upon the application of the plaintiff's counsel the trial date fixed on 30 April 2014 was vacated and the matter was adjourned to 19 May 2014.

[15] However, by a letter dated 12 May 2014, learned counsel for the plaintiff informed the court that Umang was unable to attend trial on 19 May 2014. The plaintiff then requested for an adjournment and for new dates to be fixed for continued hearing. The application for the adjournment was refused by this court.

[16] By a letter dated 15 May 2014 the plaintiff informed the court that since Umang is unable to attend trial on 19 May 2014, the plaintiff will withdraw the claim with liberty to file afresh. Learned counsel for the defendants however objected to the withdrawal with liberty to file afresh.

[17] Learned counsel for the plaintiff had in fact told the court that Umang will attend court to give evidence and had even filed the witness statement on 5 May 2014. When the trial was fixed on the aforementioned dates during CM on 5 December 2013 the availability of the witnesses was also taken into consideration as the witnesses were based in India.

[18] This suit was filed in June 2013. When the suit was filed the plaintiff knew the importance of Umang as its main witness as he was the person who was on site as well as the person having knowledge of the plaintiff's claim. If the plaintiff is given with liberty to file afresh then the plaintiff would be given a 'second bite of the cherry'. This is a clear abuse of process of the court as the cross-examination and re-examination of the plaintiff's first witness has been completed. To allow the plaintiff to file afresh against the defendants would be an injustice. There is also no guarantee that Umang will be present at the trial. Therefore, based on the circumstances of the case and the reasons mentioned above the withdrawal of the action against the defendants is allowed but without liberty to file afresh.

Plaintiff allowed to withdraw the claim without liberty to file afresh.

Reported by Ashok Kumar